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PROJECT-LABOR AGREEMENTS AFTER BOSTON HARBOR: DO THEY VIOLATE COMPETITIVE BIDDING LAWS?

David J. Langworthy[†]

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I. INTRODUCTION

From sea to shining sea, public contracting agencies are requiring that all contractors on their projects become signatory to union-only project labor agreements. . . . The practice flies in the face of state competitive bidding and it is out of control.¹

In 1993, the Supreme Court of the United States upheld the use of a project-labor agreement² on a state contract in Massachusetts.³ In *Building & Construction Trades Council v. Associated Builders & Contractors* ("Boston Harbor"), the Supreme Court determined that the National Labor Relations Act (NLRA) did not preempt a pre-hire agreement⁴ between a state and a union

1. *Union-Only Project Agreements Restrict Open Competition*, ENGINEERING NEWS-REC., July 18, 1994, at 66.

2. Project-labor agreements are comprehensive contracts that contain many clauses. Of particular importance to this Comment is a clause contained in project-labor agreements that states that all labor employed on the project must be union. This type of clause is pervasive in all project-labor agreements. See *infra* part II.A.

3. *Building & Constr. Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190, 1193 (1993) [hereinafter "Boston Harbor"].

4. See *infra* note 10 for a brief description of a pre-hire agreement.

consortium on a state-funded project.⁵ Subsequently, several courts and public agencies have misinterpreted the *Boston Harbor* decision to stand for the proposition that project-labor agreement use is unrestricted.⁶

Competitive bidding laws, however, are intended to preclude public authorities from using prejudicial bidding tactics like project-labor agreements.⁷ This Comment asserts that such agreements (1) skirt the purpose of competitive bidding laws, (2) dispense favors to union contractors over nonunion contractors, (3) constructively preclude nonunion bidders from bidding on public contracts, and (4) interfere with the free play of competitive market forces.

This Comment examines legal and policy issues surrounding the use of public sector project-labor agreements. This Comment also addresses whether public authorities have the right to mandate that the "lowest responsible bidder"⁸ on a bid for public work enter into a project-labor agreement. In accord with several recent decisions,⁹ this Comment suggests that project-labor agreement clauses be judicially and legislatively banned from the bid specifications on all public work contracts.

As background, Part II explains project-labor agreements and the competitive bidding system and then discusses early cases where public contracting favored unions in the bidding process. Part III discusses and analyzes recent judicial decisions regarding project-labor agreements and how *Boston Harbor* has influenced the public sector's use of project-labor agreements in the United States. Finally, Part IV explores several perspectives regarding whether public contracting agencies should be permitted to continue their use of project-labor agreements.

5. *Boston Harbor*, 113 S. Ct. at 1198; see also *George Harms Constr. Co. v. New Jersey Turnpike Auth.*, 644 A.2d 76, 85 (N.J. 1994) ("The theory of the *Boston Harbor* decision is that when a state acts as a market participant, it does not act as a regulator in areas of national labor policy that are preempted by the NLRA.").

6. See discussion *infra* part III.A-B.

7. See *New York State Chapter, Inc. v. New York State Thruway Auth.*, 147 L.R.R.M. (BNA) 2212, 2214 (N.Y. Sup. Ct. 1994) ("The policy of using [project-labor agreements] contravenes two of the purposes of [the bidding law] in discouraging competition by deterring nonunion bidders, and festering favoritism by dispensing advantages to unions and union contractors.").

8. The "lowest responsible bidder" concept requires that public authorities accept the lowest monetary bid submitted by a responsible contractor. See *infra* part II.B.

9. See *infra* part III.A.

II. BACKGROUND

A. Project-Labor Agreements

Project-labor agreements, one form of a pre-hire agreement,¹⁰ were first developed by public owners of large construction projects as a method to resolve problems unique to the construction industry.¹¹ The typical project-labor agreement clause requires that the lowest responsible bidder agree to execute an agreement with the trade unions in the geographic area of the project.¹²

10. *George Harms Constr. Co. v. New Jersey Turnpike Auth.*, 644 A.2d 76, 79 (N.J. 1994). Basically, "[a] pre-hire agreement is a contract agreed to by an employer and a union before the workers to be covered by the contract have been hired." *Id.* at 83 (citing *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB*, 843 F.2d 770, 773 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988)). These agreements help union contractors predict their labor costs. *Id.*

11. The United States Department of Labor examined the beginnings of project-labor agreements and found the following:

[T]he project agreement developed as a response to problems peculiar to the construction industry. The typical local agreement seldom meets the needs of massive projects such as the construction of the St. Lawrence Seaway or the Alaska Pipe Line, which last for several years, pose special problems of manning and work rules, and involve huge sums of money, a consortium of several contractors, and a great deal of public interest and often public funds. Contractors on such projects, and their eventual owners, want continuity of production, more favorable treatment of costs such as travel and overtime pay than local agreements typically provide, uniform shifts and other conditions for all trades and the help of national union officials experienced in securing manpower and administering agreements on large projects. . . . [O]ne of the chief attractions of such agreements has been their frequent inclusion of a clause promising no strikes for the duration of the project Ironically, that no-strike clause has now become a target of criticism by many contractors and owners.

LABOR MANAGEMENT SERVICES ADMINISTRATION, U.S. DEP'T OF LABOR, THE BARGAINING STRUCTURE IN CONSTRUCTION: PROBLEMS AND PROSPECTS 14 (1980).

12. Language similar to the following is standard in most project-labor agreements:

In order to ensure timely completion of the project, without delays, strikes, or work stoppages caused by any reason or dispute, the contractor shall enter into a no lock-out/no strike agreement with the major supplier of labor in the area. All subcontractors will agree to be bound by the terms and conditions of said agreement In the event of a strike or lock-out in the building industry, the construction of the project shall not be halted in any respect or for any reason, but will continue with the understanding that all settlements made between any affiliated local union and the existing established contractor groups shall be made retroactive provided that any provision of the settlement does not discriminate against this project.

From the files of Todd Goderstad, General Counsel of the Associated General Contractors of Minnesota (n.d.).

Most such agreements

require[] the contractors and subcontractors to recognize [a particular labor

Under the original version of the NLRA,¹³ all pre-hire agreements were illegal because the agreements appointed a sole union representative before an election of union members had been held.¹⁴ However, when Congress recognized the impact this constraint had on the construction industry,¹⁵ Congress amended the NLRA to allow contractors to enter into pre-hire agreements.¹⁶

organization] as bargaining representative for all craft employees, to hire workers through the hiring halls of the [organization's] constituent unions, to require hired workers to join the relevant union within seven days, to follow specified dispute-resolution procedures, to apply the [organization's] wage, benefit, seniority, apprenticeship and other rules, and to make contributions to the * * * union's benefit funds. In return for the [proprietor's] promise to insist that contractors sign the agreement, the [organization] * * * promise[s] the [proprietor] labor peace throughout the * * * life of the construction project.

George Harms, 644 A.2d at 84 (alterations and omissions in original) (quoting *Associated Builders & Contractors, Inc. v. Massachusetts Water Resources Auth.*, 935 F.2d 345, 360 (1st Cir. 1991), *rev'd sub nom.* *Boston Harbor*, 113 S. Ct. 1190 (1993)).

13. National Labor Relations Act, ch. 372, § 8, 49 Stat. 452 (1935).

14. *George Harms*, 644 A.2d at 84.

15. The NLRA was enacted in 1935 to enable employees to organize. 1 *THE DEVELOPING LABOR LAW* 28 (Charles J. Morris et al. eds., 2d ed. 1983). In addition, the NLRA "also gave meaning to this organizational right by requiring employers to bargain collectively with employees through representatives chosen by the employees." 1 *id.* The Act specifies the election procedures for one to become an agent or representative of an employee group. 1 *id.* at 341-412; *see also*, JOHN J. KENNY, *PRIMER OF LABOR RELATIONS* 29-43 (23d ed. 1986). A representative cannot bargain with an employer until the union has obtained majority status as required by the NLRA. *Phoenix Eng'g, Inc. v. MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1518 (6th Cir. 1991).

Contractors depend heavily on short-term or temporary labor. 1 *THE DEVELOPING LABOR LAW*, *supra*, at 48. Because of the short-term nature of construction worker employment, it is extremely difficult to certify a bargaining agent for a group of construction employees prior to the project start date. *Boston Harbor*, 113 S. Ct. 1190, 1198 (1993). The difficulty in establishing a bargaining agent for the employees created a problem for the construction industry because historically work rules and wage rates were routinely established prior to the beginning of a construction project. *Id.* The problem that the NLRA created for the construction industry prompted Congress in 1959 to create a special exemption for the construction industry. *George Harms*, 644 A.2d at 84.

16. Pub. L. No. 86-257, § 705(a) (codified at 29 U.S.C. § 158(f) (1959)). Adding in part to the NLRA:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established . . . or (2) such agreement requires as a condition of employment, membership in such labor organization

Id.

Project-labor agreements are created when local union trades unite and negotiate one master agreement with the owner of a construction project. These agreements typically include coverage on wages, fringe benefits, work rules, and shifts.¹⁷ Another common aspect of project-labor agreements is that unions agree not to strike or slow down a project for the entire duration of the project.¹⁸

There are advantages and disadvantages to every project-labor agreement. The benefit to a contractor participating in a project-labor agreement is the stability provided on the project in terms of labor cost and availability.¹⁹ The threat of labor problems (i.e., strikes or slowdowns) can be greatly diminished if all contractors on a given project employ union labor. However, a project-labor agreement is a contract and can be breached when it is economically or politically advantageous for the breaching party. Thus, while project-labor agreements may solidify variable project expenses, the agreements are not infallible.²⁰

17. See *Minnesota Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis*, 825 F. Supp. 238, 241 (D. Minn. 1993); *George Harms*, 644 A.2d at 84.

18. 26 Minn. Op. Att'y Gen. 707a, 20-21 (1993).

19. *George Harms*, 644 A.2d at 79 (O'Hern, J., dissenting).

20. For example, a sheet metal union disclaimed its pre-hire agreement with a contractor when the contractor "double breasted." *Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1254 (3d Cir. 1991). "Double breasting refers to the creation of two distinct operating entities, one governed by a collective bargaining agreement and one totally unencumbered by such an agreement." Joseph H. Bucci & Brian P. Kirwan, *Double Breasting in the Construction Industry*, CONSTR. LAW., Jan. 1990, at 1, 1. Simply stated, one owner actually controls two construction companies, one company that is union and the other that is non-union.

Limbach was a union contractor that had a collective bargaining agreement with various sheet metal unions. *Limbach*, 949 F.2d at 1213. In 1982-83, Limbach was reorganized, becoming a subsidiary of Limbach Constructors, Inc., as did a new entity, Jovis Construction, Inc. *Id.* Jovis Construction was formed to acquire the nonunion operations. *Id.* The sheet metal union was unhappy with Limbach's double breasting and encouraged its members to quit Limbach in protest. *Id.* at 1220. One message the union sent to its members stated:

Today is the last day Sheet Metal Worker' Local Union 108 members will be working at Western Air [Limbach's operating name in Los Angeles].

The company that owns Western Air also owns a non-union contractor. Employees for that company do the same work we do, but at substandard wages and conditions. . . .

WE WON'T WORK FOR A DAMN CONTRACTOR THAT USES NON-UNION LABOR. WE'RE WALKING OFF TODAY TO MAKE SURE THERE WILL BE UNION JOBS TOMORROW.

Id. (omission in original).

Because Limbach would not change its nonunion operations to union operations, the sheet metal union disclaimed its contracts with Limbach. *Id.* Essentially, the union

Project-labor agreements may also have a detrimental effect on union contractors. Some contractors maintain a relationship with only one or two unions.²¹ When these contractors enter into a project-labor agreement, they become obligated to many more union trade organizations. Other union contractors may have previously bargained for their particular labor needs, only to have the public authority negotiate a project-labor agreement with the same unions that is less advantageous to the contractors bidding on the project.²²

B. Competitive Bidding

1. The Basic Process

Public bidding requirements are substantially similar at the federal,²³ state,²⁴ and municipal²⁵ levels.²⁶ The bidding pro-

breached its agreement with the contractor because the contractor would not agree to convert its nonunion operations to union operations.

See also *Colfax Corp. v. Illinois State Toll Highway Auth.*, No. 93 C 7463, 1994 WL 444882 (N.D. Ill. 1994). This case involved a nonunion contractor that agreed to sign a project-labor agreement, but the unions would not sign unless the contractor agreed to convert its entire operation to union-only employees. *Id.* at *2.

21. One contractor who employs only one union to perform multiple craft operations is George Harms Construction Company. *George Harms*, 644 A.2d at 80. The employees of George Harms Construction Company belong to the United Steelworkers of America union. *Id.* Members of the Steelworkers union will perform many tasks, including operating machinery, labor work, and carpentry. *Id.*

Glenwood Bridge, Inc., had a collective bargaining agreement with the Christian Laborers Association Local Number 78, a NLRB certified labor organization. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 368 (8th Cir. 1991). The agreement contained a no strike/no lockout clause. *Id.* The agreement between Glenwood Bridge and its union was not satisfactory to the City of Minneapolis, which wanted the contractor to enter into an agreement with the Minneapolis Building and Construction Trades Council, AFL-CIO. *Id.*

22. It was reported that the Associated General Contractors believes "[p]ublic contracting agencies that succumb to pressure from organized labor for union-only project agreements on public works often are unskilled negotiators and do not even get the best deal available in the union sector" *Union-Only Labor Pacts Cost Public More*, *ENGINEERING NEWS-REC.*, Dec. 19, 1994, at 15, 15.

23. With few exceptions, federal government contracts must be let by competitive bid. 41 U.S.C. § 253(a)(1) (1988). In order to maximize competition in federal procurement, Congress passed the Competition in Contracting Act of 1984. This Act provides that "an executive agency in conducting a procurement for property or services (A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984" *Id.*; see also, 10 U.S.C. § 2304(a)(1)(A) (1988) (imposing the same requirement on armed services procurement).

cess initially begins with the preparation of specifications by a public contracting agency.²⁷ The specifications must be free of ambiguity and conflicting provisions and must provide a common standard by which to compare various bid submissions in order to determine the lowest responsible bidder.²⁸ Once the specifications are prepared, an invitation for bids is issued by the public contracting agency.²⁹ The invitation for bids is followed by the opening of bids received and an award to the lowest responsible bidder.³⁰

2. *The Purpose of Competitive Bidding*

The function of competitive bidding is twofold. First,

24. For example, Minnesota statutes require competitive bidding in the following areas of statewide expenditures:

Minnesota Department of Administration: If the amount of a contract for construction or repair, a purchase of supplies or materials, a purchase or rental of equipment, or a sale of property is estimated to exceed \$15,000, then the Commissioner of the Department of Administration must solicit competitive bids. See MINN. STAT. § 16B.07, subd. 1, 3 (1994).

Minnesota Department of Transportation: If the estimated cost of construction or maintenance work on state trunk highways exceeds \$75,000, then the Commissioner of Transportation must solicit bids, except in the case of emergencies. See MINN. STAT. § 161.32, subd. 1-3 (1994).

State Zoological Board: If the amount of a contract for supplies or materials, a purchase or rental of equipment, or a provision of utility services is estimated to exceed \$15,000, then the State Zoological Board must solicit bids. See MINN. STAT. § 85A.02, subd. 18 (1994). The Board also must comply with competitive bidding laws when acquiring transportation systems, facilities, or equipment by lease-purchase or installment purchase contracts. See MINN. STAT. § 85A.02, subd. 16 (1994).

See also Jeffrey W. Coleman, *Who Is Subject to Public Building Requirements?*, Presentation at the Minnesota State Bar Association, Construction Law Symposium (Feb. 1994) (referencing same statutes).

25. An example in Minnesota includes:

Counties: If the estimated amount exceeds \$25,000, Minnesota law requires public solicitation of contracts entered into by a county for the sale or rental of supplies, materials, or equipment or for the construction, alteration, repair, or maintenance of real or personal property. See MINN. STAT. § 471.345, subd. 1-3 (1994); see also Coleman, *supra* note 24 (referencing same statute).

26. David E. Rosengren & Thomas G. Librizzi, *Bid Protests: Substance and Procedure on Publicly Funded Construction Projects*, CONSTR. LAW., Jan. 1987, at 1, 1.

27. *Id.*

28. Arthur R. Kobin, *Local Public Contracts Law Fosters Competition*, N.J. LAW., Mar.-Apr. 1991, at 28, 28.

29. The bid invitation will (1) state when the bids are due, (2) describe the relevant contract documents, (3) describe where the bids may be obtained, and (4) give detailed instructions on the manner in which the bid documents are to be completed. Rosengren & Librizzi, *supra* note 26, at 1.

30. *Id.*

competitive bidding guards "against corruption, favoritism, and abuse of discretion by public officials in the award of contracts."³¹ Second, competitive bidding provides the "public with the lowest price and the best quality construction" on public projects.³² Publicly funded construction projects subject to competitive bidding usually must be awarded to the lowest responsible bidder.³³

3. *Lowest Responsible Bidder*

It is important to understand the concept of the lowest responsible bidder in the context of the competitive bidding process. Fundamentally, a contractor is considered to be a responsible contractor if it is reputable; has adequate financial resources or the ability to obtain them; and has the experience, assets, and knowledge to perform a contract.³⁴ Although it is beyond the scope of this Comment, a more detailed list of factors to consider is contained in the Code of Federal Regulations.³⁵

The lowest responsible bidder determination is often a point of controversy. The "lowest" bidder aspect is simply settled by a comparison of the bid amounts. The "responsibility" requirement poses difficult factual issues for a contracting agency. However, a public authority making a determination of responsibility is generally given great deference in this determination.³⁶

31. *Id.* at 10.

32. *Id.*

33. *Id.* at 13.

34. Federal Acquisition Regulation, 48 C.F.R. § 9.104-1 (1994).

35. In order for the federal government to find a contractor responsible, the Federal Acquisitions Regulations have established that a contractor must

(1) have or be able to obtain adequate financial resources to perform the contract; (2) be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and government business commitments; (3) have a satisfactory performance record; (4) have a satisfactory record of integrity and business ethics; (5) have or be able to obtain the necessary organization, experience, accounting and operational controls, and technical skills; (6) have or be able to obtain the necessary production, construction, and technical equipment and facilities; and (7) be otherwise qualified and eligible to receive an award under applicable laws and regulations.

RALPH C. NASH, JR. & STEVEN L. SCHOONER, *THE GOVERNMENT CONTRACT REFERENCE BOOK, A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* 341 (1992).

36. Elsa K. Cole & Steven M. Goldblatt, *Award of Construction Contracts: Public Institutions' Authority to Select the Lowest Responsible Bidder*, 16 J.C. & U.L. 177, 181 (1989) ("Courts presume that the institution's decision to reject the lowest bidder is regular

A court will rarely overturn an agency's ruling on this matter.³⁷ To be overturned, a bidder must demonstrate that the awarding authority acted irrationally³⁸ or in an arbitrary and capricious manner.³⁹

Labor affiliations of a contractor may be considered when determining whether a contractor is responsible.⁴⁰ Notwithstanding this consideration, discrimination between bidders based solely upon their union status is prohibited.⁴¹ The Minnesota Supreme Court has explained that when exercising discretion concerning which bidder is the "lowest responsible bidder," the determination must be "based upon some substantial difference in quality or adaptability."⁴² When a low bidder is not found "responsible," several courts have held that the low bidder must be given an opportunity to be heard on the

and lawful.").

37. Generally, "[c]ontracting officials can exercise discretion upon a wide range of issues confronting them . . ." *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970). It is well-settled law that public agencies have the discretion to determine "lowest responsible bidder" status on public works contracts. See *C.N. Robinson Lighting Supply Co. v. Board of Educ.*, 602 A.2d 195, 198 (Md. Ct. Spec. App. 1992); *Scheckel v. Jackson County, Iowa*, 467 N.W.2d 286, 290 (Iowa Ct. App. 1991); *Nevada v. George's Equip. Co.*, 783 P.2d 949, 954 (Nev. 1989).

Consistent with that rule, courts will not intrude into the discretionary domain of public contracting agencies without good cause. See *Ward Int'l Trucks, Inc. v. Baldwin County Bd. of Educ.*, 628 So.2d 572, 573 (Ala. 1993) ("[A]uthorities should have discretion in determining who is the lowest responsible bidder. This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously . . ."); *Electronics Unlimited Inc. v. Village of Burnsville*, 289 Minn. 118, 124, 182 N.W.2d 679, 683 (1971) (stating that "the proper function of the court is simply to restrain the unlawful exercise of that discretion" to choose the lowest responsible bidder); *West v. City of Oakland*, 159 P. 202, 204 (Cal. Ct. App. 1916) (recognizing that when a public agency "has been invested with discretionary power as to which is the lowest responsible bidder . . . such discretion will not be interfered with by the courts, in the absence of direct averments and proof of fraud").

38. *Schiavone Constr. Co. v. Samowitz*, 451 F. Supp. 29, 31 (S.D.N.Y. 1978).

39. See generally *Cole & Goldblatt*, *supra* note 36, at 182 (asserting that a public agency's actions will not be classified as arbitrary and capricious unless it acted "without consideration and in disregard of facts or circumstances").

40. See generally 1A CHESTER J. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 10.52 (1993) (noting that anything relevant to a contractor's performance of a project may be considered in making a responsibility determination).

41. *E.g.*, *Miller v. City of Des Moines*, 122 N.W. 226, 230-32 (Iowa 1909) (holding that city officials could not discriminate between firms based on whether they were union or nonunion in determining the lowest responsible bidder for a printing contract).

42. *Otter Tail Power Co. v. Village of Elbow Lake*, 324 Minn. 419, 425, 49 N.W.2d 197, 201 (1951).

question of responsibility.⁴³

C. Union-Only Restrictions on Public Contracts

Competitive bid laws are intended to secure unrestricted competition among all potential bidders.⁴⁴ Toward this end, it is recognized that a bid proposal for public work may not limit bidders to those who agree to furnish union labor.⁴⁵ The majority view is that "a proposal or advertisement limiting bidders to those who agree to employ union labor, or to furnish goods bearing the union label is invalid."⁴⁶ Whether a statute exists requiring competitive bidding is irrelevant.⁴⁷ Municipalities do not have the authority to discriminate between union and nonunion contractors when determining the lowest responsible bidder.⁴⁸ Similarly, federal and state governments

43. See, e.g., *Seacoast Constr. Corp. v. Lockport Urban Renewal Agency*, 339 N.Y.S.2d 188, 192 (N.Y. Sup. Ct. 1972) (holding that the low bidder is to "be afforded an opportunity to present evidence as to the circumstances upon which the Agency relied" in disqualifying the low bidder); see also *Cole & Goldblatt*, *supra* note 36, at 183 ("Courts generally agree that some minimal process is due before an institution may reject an apparent low bidder as nonresponsible.").

Likewise, a California court has declared that before a contract can be awarded to one other than the lowest bidder, the public contracting agency must "afford [the low monetary bidder] an opportunity to rebut such adverse evidence, and permit him to present evidence that he is responsible and qualified to perform the contract." 1A ANTIEAU, *supra* note 40, § 10.52 (1993) (citing *City of Inglewood—Los Angeles County Civic Ctr. Auth. v. Superior Ct.*, 500 P.2d 601 (Cal. 1972)).

44. 3 E.C. YOKLEY, MUNICIPAL CORPORATION § 442, at 24-25 (1958). "The purpose of competitive bidding is, of course, to invite competition, by permitting those persons who have the ability to furnish material or supplies or to perform work to compete freely without the imposition of restrictions which are unreasonable." 3 *id.* Additionally, "[t]he purpose of such a [competitive bidding] provision is to secure unrestrictive competitive bidding so as to prevent favoritism and collusion . . ." 3 *id.* at 25.

See *supra* notes 24-25 and *infra* note 93 for examples of several competitive bidding statutes.

45. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 29.48, at 428 (Gail A. O'Grady & Charity R. Miller eds., 3d ed., rev. 1990) (citing *Neal Pub. Co. v. Rolph*, 146 P. 659 (Cal. 1915); *City of Atlanta v. Stein*, 36 S.E. 932 (Ga. 1900); *Holden v. City of Alton*, 53 N.E. 556 (Ill. 1899); *Littler v. Jayne*, 16 N.E. 374 (Ill. 1888); *Chicago v. Rumpff*, 45 Ill. 90 (1867); *Miller v. City of Des Moines*, 122 N.W. 226 (Iowa 1909); *Lewis v. Board of Educ.*, 102 N.W. 756 (Mich. 1905); *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 66 P. 496 (Mont. 1901); *State v. Mayor of Paterson*, 48 A. 589 (N.J. 1901); *State v. City of Atlantic City*, 44 A. 651 (N.J. 1899)).

46. *Id.*

47. *Id.*

48. *Miller v. City of Des Moines*, 122 N.W. 226, 231 (Iowa 1909).

may not discriminate on the basis of union affiliation.⁴⁹ The following synopsis of several cases illustrates the general rule that public contracting agencies may not discriminate in favor of unions or contractors that employ only union labor.

1. *Holden v. City of Alton*⁵⁰

In 1899, the Illinois Supreme Court decided a union-only public contracting issue. In *Holden*, the City of Alton, Illinois, was approached by the Typographical Union to adopt an ordinance in its favor.⁵¹ The Union requested that the City award contracts for city printing exclusively to printing offices that employed union labor.⁵² The City of Alton adopted an ordinance acquiescing to the Union's request.⁵³

Subsequently, the City solicited bids for a printing contract.⁵⁴ The contract was awarded to the second lowest bidder, a union printer, rather than to the lowest bidder, a nonunion printer.⁵⁵ The *Holden* court found the low bidder to be "an experienced, practical, and responsible printer, fully qualified to comply with his bid."⁵⁶ The court then decided that the low bidder had been arbitrarily excluded from the contract with the City.⁵⁷ It did not matter that a union-only ordinance existed as a basis for the City's action.⁵⁸

49. In 1952, the architect who was directing renovation work at the nation's capital queried whether an award to a nonunion contractor was proper. The Comptroller General responded to the architect's question in the following way:

The Congress has enacted various statutes dealing with labor standards to be observed by [g]overnment contractors . . . requiring the payment of minimum wages . . . [and] forbidding work in excess of eight hours a day without overtime pay It is understood that full compliance with these and other applicable statutory requirements will be required under the contract involved. No statute requires the employment of union labor by [g]overnment contractors, and generally there would be no legal justification for the rejection of the lowest bid received solely because of the fact that the low bidder may not employ union labor.

Comptroller General Warren to the Architect of the Capital, May 2, 1952, 31 DECISION OF THE COMP. GEN. 561 (1952) (citations omitted).

50. 53 N.E. 556 (Ill. 1899).

51. *Holden v. City of Alton*, 53 N.E. at 556.

52. *Id.*

53. *Id.* at 557.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

2. *Miller v. City of Des Moines*⁵⁹

Ten years later, the Iowa Supreme Court decided a case similar to *Holden*. In *Miller*, eight printing firms responded to a city bid request for printing services.⁶⁰ The City awarded the printing contract to the fifth lowest bidder.⁶¹ The four lower bidders did not employ union labor in their printing shops.⁶² The fifth lowest, and successful bidder, did employ union labor.⁶³ The plaintiff alleged, and the *Miller* court found, that the nonunion bidders were excluded from the competition because of their nonunion status.⁶⁴ The court stated that the interests of taxpayers are best served when competitive bidding, open to all who can perform the work, is used to award a contract.⁶⁵

The *Miller* court then stated that in denying a public contract based on union affiliations, not one, but two wrongs are committed.⁶⁶ First, the bidder is harmed because it should be evaluated on its qualifications, not on extrinsic considerations.⁶⁷ Second, the public is harmed because costs may be increased and the state's "integrity [is] jeopardized by a system of favoritism, the demoralizing effect of which is patent to every thoughtful student of public affairs."⁶⁸

Finally, the *Miller* court made an observation about obstructing competitive bidding in favor of union contractors: individuals are free to give their money away but authorities acting on behalf of the public are not.⁶⁹

59. 122 N.W. 226 (Iowa 1909).

60. *Miller v. City of Des Moines*, 122 N.W. at 228.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 230.

65. *Id.*

66. *Id.* at 231.

67. *Id.*

68. *Id.*

69. *Id.*

3. *Adams v. Brennan*⁷⁰

The Illinois Supreme Court also decided a construction industry union-only case in the late nineteenth century. The *Adams* court held that the Chicago Board of Education had no right to specify in an improvement contract that only union labor could be used by the successful bidder.⁷¹

The Chicago Board of Education had entered into an agreement with the Building Trades Council⁷² whereby the Board agreed to insert a union-only clause into its contracts for school building improvements.⁷³ Subsequently, the Board advertised for a renovation.⁷⁴ The contract contained the following clause:

Notice: None but union labor shall be employed on any part of the work where said work is classified under any existing union.⁷⁵

The court found that this clause clearly discriminated between different classes of citizens.⁷⁶ Further, this discrimination restricted competition and increased the cost of work.⁷⁷ Even if the Board thought its action was for the good of the public, it did not have the authority to limit competition among potential bidders.⁷⁸ The *Adams* court stated that “[t]he effect of the provision is to limit competition by preventing contractors from employing any except certain persons . . . and such a provision is illegal and void.”⁷⁹

III. THE MISTAKEN BELIEF THAT *BOSTON HARBOR* PERMITS UNRESTRICTED USE OF PROJECT-LABOR AGREEMENTS

The Massachusetts Water Resources Authority (MWRA), a state agency,⁸⁰ failed to prevent the pollution of the Boston

70. 52 N.E. 314 (Ill. 1898).

71. *Adams v. Brennan*, 52 N.E. 314, 317 (Ill. 1898).

72. The Building Trades Council consists of the labor and trade unions in the City of Chicago. *Id.* at 315.

73. *Id.*

74. *Id.*

75. *Id.* at 316.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Boston Harbor*, 113 S. Ct. 1190, 1191 (1993).

Harbor and was ordered by the United States District Court of Massachusetts to clean it up.⁸¹ The cleanup was estimated to cost over six billion dollars and to take ten years to complete.⁸²

The MWRA inserted a project-labor agreement specification into the bid documents.⁸³

The project-labor agreement was challenged by an organization of nonunion contractors, which alleged that the MWRA was regulating labor and thus preempting the NLRA.⁸⁴ The United States Supreme Court held that the project-labor agreement specification was valid and did not preempt the NLRA because the MWRA was acting as a market participant, not as a governmental entity, when it specified the project-labor agreement for the Boston Harbor clean-up project.⁸⁵

A. *Recent Decisions Invalidating Project-Labor Agreements*

Subsequent to *Boston Harbor*, some success has been achieved by organizations challenging project-labor agreements. In 1994, several New York and New Jersey courts decided that project-labor agreements violate competitive bidding laws, even though mandatory project-labor agreements restricting the use of nonunion labor were previously upheld.⁸⁶ A discussion of these cases follows.

1. *Empire State Chapter of Associated Builders & Contractors, Inc. v. County of Niagara*⁸⁷

In *Empire State*, a construction trade association brought an action challenging a negotiated pre-hire collective bargaining agreement between Niagara County and the local unions of the

81. *United States v. Metropolitan Dist. Comm'n*, 16 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,621, 20,621 (D. Mass. 1985).

82. *Boston Harbor*, 113 S. Ct. at 1192.

83. *Id.* at 1193.

84. *Id.* at 1194.

85. *Id.* at 1198. Preemption applies only to state regulation. *Id.* at 1196. The fact that a state government acts in the area of a protected zone (i.e., labor) does not mean the state is acting in a regulatory capacity. *Id.* at 1196. The Supreme Court noted that "the NLRA was intended to supplant state labor regulation, not all legitimate state activity that affects labor." *Id.* Once the Court determined that the MWRA was acting as a purchaser of construction services, the preemption doctrine could not apply to MWRA's project-labor agreement specification. *Id.* at 1199.

86. See *infra* part III.B.

87. 615 N.Y.S.2d 841 (N.Y. Sup. Ct. 1994).

Niagara County Building Trades Council.⁸⁸ The agreement was negotiated for use on the construction of a county jail.⁸⁹ The jail specifications stated that a contractor awarded a contract to any of the jail bid packages must comply with the agreement.⁹⁰ In effect, the agreement required that successful bidders employ union labor on the jail project.⁹¹

The plaintiff trade association alleged that the agreement violated competitive bidding statutes.⁹² Agreeing with the trade association, the court stated:

So essential is the notion of free and open competition to the system of letting contracts for public improvements that any ordinance, local law, contract requirement or bid specification "which establishes a precondition to the award of a contract to the lowest responsible bidder, is inconsistent with General Municipal Law Section 103⁹³ and, therefore, invalid unless its establishment as a precondition is expressly authorized by an act of the legislature"⁹⁴

The court held that the project-labor agreement was a prequalification which violated the state competitive bidding laws.⁹⁵

Defendant, County of Niagara, relied on *Boston Harbor* for authority to use the project-labor agreement as a contract prequalification.⁹⁶ The court, however, rejected this argument, recognizing that in *Boston Harbor* the United States Supreme Court decided only that a public authority does not violate the NLRA when it negotiates a pre-hire agreement for a project in which it has a propriety interest.⁹⁷

88. *Empire State Chapter of Associated Builders & Contractors, Inc. v. County of Niagara*, 615 N.Y.S.2d at 841-42.

89. *Id.* at 841.

90. *Id.* at 842.

91. *Id.*

92. *Id.*

93. This statute states "all contracts for public work involving an expenditure of more than . . . dollars . . . shall be awarded . . . to the lowest responsible bidder" N.Y. GEN. MUN. LAW § 103(1) (McKinney 1995).

94. *Empire State*, 615 N.Y.S.2d at 842 (quoting *Associated Builders & Contractors, Inc. v. City of Rochester*, 501 N.Y.S.2d 653, 654 (N.Y. 1986)).

95. *Id.* at 843.

96. *Id.*

97. *Id.*

2. *George Harms Construction Co. v. New Jersey Turnpike Authority*⁹⁸

George Harms involved a union contractor⁹⁹ who did not desire to become signatory to another union agreement.¹⁰⁰ The New Jersey Turnpike Authority (NJTA) required all contractors and subcontractors to enter into project-labor agreements with the Building and Construction Trades Council of the AFL-CIO of the State of New Jersey.¹⁰¹ Labor disturbances in 1993, involving George Harms Construction Company and the local operating engineers union, precipitated NJTA's project-labor agreement specification.¹⁰²

The NJTA relied on *Boston Harbor* for the authority to require the successful bidder to enter into a project-labor agreement.¹⁰³ The *George Harms* court, however, found that *Boston Harbor* did not give the NJTA this authority.¹⁰⁴ According to the court, *Boston Harbor* only established that "federal labor law [(the NLRA)] does not prevent a state or public entity, acting as [a] purchaser of contracting services, from requiring adherence to project-labor agreements on public-construction work."¹⁰⁵

The *George Harms* court held that the state public bidding laws do not permit the use of agreements that require contractors to use certain labor organizations while excluding other labor sources.¹⁰⁶ Discussing the policy of competitive bidding statutes, the court noted that "bidding statutes are for the benefit

98. 644 A.2d 76 (N.J. 1994).

99. Harms' workers belonged to the United Steelworkers of America union. *George Harms Constr. Co. v. New Jersey Turnpike Auth.*, 644 A.2d at 80. The Steelworkers would perform tasks typically preformed by laborers, operators, carpenters, and various other trades. *Id.*

100. *Id.*

101. *Id.* at 79.

102. *Id.* at 80. The NJTA's chief engineer stated that:

[I]n light of the July 1993 statewide strike of highway and utility construction sites by Local 825 and the refusal of other AFL-CIO locals to cross Local 825's picket lines, any further strikes would cause intolerable delays in light of the [TPA's] December 1995 deadline for completion of the Widening.

Id. (alternations in original).

103. *Id.* at 94.

104. *Id.*

105. *Id.*

106. *Id.* at 79.

of the taxpayers.”¹⁰⁷ Such laws are intended to “guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition.”¹⁰⁸ Moreover, any bidding practices that may adversely affect the bidding process are prohibited, even though it is clear that “there [is] no corruption or any actual adverse effect upon the bidding process.”¹⁰⁹

107. *Id.* at 91 (quoting *Terminal Constr. Corp. v. Atlantic County Sewerage Auth.*, 341 A.2d 327, 330 (N.J. 1975)).

108. *Id.* (quoting *Terminal Constr. Corp. v. Atlantic County Sewerage Auth.*, 341 A.2d 327, 330 (N.J. 1975)).

109. *Id.*

3. *New York State Chapter, Inc. v. New York State Thruway Authority*¹¹⁰

The New York State Thruway Authority (NYSTA) included

110. 147 L.R.R.M. (BNA) 2212 (N.Y. Sup. Ct. 1994). The *Thruway Authority* supreme court decision was overturned on December 22, 1994, by the New York Supreme Court, Appellate Division, Third Department. See *New York State Chapter, Inc. v. New York State Thruway Auth.*, 620 N.Y.S.2d 855, 859 (N.Y. App. Div. 1994).

On appeal, the appellate division court stated that New York competitive bidding laws did not create a *per se* rule against project-labor agreements in public construction projects. *Id.* at 857. In harmony with that assertion, the court concluded that this particular project-labor agreement did not violate state competitive bidding laws. *Id.* at 856.

The appellate division court held that the project-labor agreement was valid because the Thruway Authority had a rational reason for imposing it. *Id.* at 858. The Thruway Authority asserted two reasons for its desire to use a project-labor agreement on the Tappan Zee Bridge project. *Id.* at 856. The first reason was that "the Thruway Authority concluded that the likely successful bidder would be a union contractor" *Id.* This conclusion was based on the fact that of 23 major construction projects on this bridge, 20 had been awarded to union contractors. *Id.* To bolster its reasoning, the appellate division court also noted that 19 different unions would be involved in the project if it was awarded to a union contractor. *Id.* The unions had "different starting times, scheduling restrictions, holidays, grievance resolution procedures," and other differences. *Id.*

The second reason the Thruway Authority specified the use of a project-labor agreement was based on a prior labor dispute. *Id.* An earlier bridge project involving a nonunion contractor had resulted in a labor dispute that had caused delays and increased costs. *Id.*

It is the author's opinion that the findings of the appellate division court are without merit. The mere fact that a majority of past contracts have been awarded to union contractors is no reason to trample the rights of nonunion contractors and to deny them a fair opportunity to compete for a contract. Moreover, the fact that the contract involves numerous unions is not a valid reason for imposing a project-labor agreement. If a union contractor is awarded the contract, it can choose to enter into a project work rules agreement with all of the unions and, arguably, do a much better job negotiating with the unions than a public agency. See Hazel Bradford, *Defenders of Union Facts Take Issue with AGC Report*, ENGINEERING NEWS-REC., Feb. 20, 1995, at 11 (discussing a publication of the Associated General Contractors of America in which the authors argue that "construction employers, not public contracting officers, 'are the most knowledgeable and best able to negotiate' such agreements").

The appellate division court also should not have accepted a threat of labor disturbances as a Thruway Authority reason for its use of a project-labor agreement. A threat of labor disturbances is not a valid reason to utilize project-labor agreements. See *infra* notes 124 and 186 and accompanying text.

From the beginning, both sides anticipated that this case would go to the highest court in New York. See William Krizan & Hazel Bradford, *Threshold is for Change and Pain*, ENGINEERING NEWS-REC., Jan. 30, 1995, at 60, 60. As of this writing, New York State Chapter's motion for review has been granted by the New York Court of Appeals. 132 DAILY LAB. REP. D-9, July 11, 1995, available in WESTLAW, BNA-DLR database. The case is expected to be argued in January 1996. *Id.*

a project-labor agreement bid specification requiring the successful bidder to execute the agreement on a \$130 million bridge project.¹¹¹ The project-labor agreement proclaimed that the signatory unions were the only source of labor for the project.¹¹² The unions reciprocated by making concessions that the NYSTA believed would "avoid costly delays caused by strikes, slowdowns, walkouts, picketing and other disruptions arising from work disputes"¹¹³

The NYSTA believed that the insertion of the project-labor agreement into the project specifications was legal under *Boston Harbor*.¹¹⁴ The New York Supreme Court of Albany County, however, adopted the reasoning of *George Harms*¹¹⁵ and concluded that the project-labor agreement effectively excluded nonunion contractors from the bidding process.¹¹⁶ The court noted that the policy of using project-labor agreements worked against two purposes of the competitive bidding statutes.¹¹⁷ First, it discouraged competition by deterring nonunion bidders.¹¹⁸ Second, it gave an unfair advantage to unions and union contractors.¹¹⁹

111. *Thruway Authority*, 147 L.R.R.M. (BNA) at 2213.

112. *Id.*

113. *Id.*

114. *Id.*

115. The *Thruway Authority* supreme court couched its adoption of the *George Harms Construction Co. v. New Jersey Turnpike Authority*, 644 A.2d 76 (N.J. 1994) decision in unambiguous language:

[T]his Court adopts the reasoning of the Supreme Court of New Jersey in reaching its holding striking down a prehire [agreement] as in violation of the policies underlying the State's public bidding laws. The Harms opinion is persuasive, and compelling. This Court can add nothing to the legal discussion set forth in Harms

Thruway Authority, 147 L.R.R.M. (BNA) at 2214.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

4. *General Building Contractors v. Dormitory Authority*¹²⁰

The *Dormitory Authority*¹²¹ case was decided contemporaneously with *New York State Chapter, Inc. v. New York State Thruway Authority*.¹²² The court stated that its reasoning in *Thruway Authority* also applied to *Dormitory Authority*.¹²³ The only addition to the court's analysis in *Dormitory Authority* was its statement that "the threat of labor unrest, or the inconveniences caused by such an actuality, will not serve to undermine the purposes of the public bidding statutes."¹²⁴

B. *Recent Decisions Failing to Eliminate Project-Labor Agreement Bid Specifications*

Several courts have recently upheld a public agency's right to require project-labor agreements. In most of these cases, however, the respective courts sidestepped the competitive bidding issue.

120. 147 L.R.R.M. (BNA) 2214 (N.Y. Sup. Ct. 1994). This decision was overturned on December 22, 1994, by the New York Supreme Court, Appellate Division, Third Department. See *General Bldg. Contractors v. Dormitory Auth.*, 620 N.Y.S.2d 859, 860 (N.Y. App. Div. 1994).

In the reversal, the appellate division court indicated that the project-labor agreement at issue was substantially similar to the project-labor agreement in *New York State Chapter, Inc. v. New York State Thruway Authority*, 147 L.R.R.M. (BNA) 2212 (N.Y. Sup. Ct. 1994). *Dormitory Auth.*, 620 N.Y.S.2d at 860-61. The appellate division court applied its *Thruway Authority* analysis in holding that the project-labor agreement did not violate competitive bidding laws. *Id.*

In its *Thruway Authority* analysis, the appellate division court had looked at the factors the Dormitory Authority considered when it decided to incorporate a project-labor agreement into the bid specifications. *Id.* The reasons included the size of the project, the need to minimize delays, and the potential for labor unrest. *Id.* As it did in its *Thruway Authority* decision, the appellate division court examined the public contracting agency's reasons and concluded that these concerns were "consistent with the purpose of the lowest responsible bidder requirement . . ." *Id.* As in the *Thruway Authority* appellate division decision, these reasons are without merit. See *supra* note 110.

121. 147 L.R.R.M. (BNA) 2214 (N.Y. Sup. Ct. 1994).

122. *Id.* at 2212. See *supra* part III.A.3. for a discussion of the *Thruway Authority* case.

123. 147 L.R.R.M. (BNA) at 2214.

124. *Id.* at 2214-15.

1. *Phoenix Engineering v. MK-Ferguson of Oak Ridge Co.*¹²⁵

In *Phoenix Engineering*, the Department of Energy (DOE) contracted with MK-Ferguson of Oak Ridge Company (MK-F) to handle all maintenance and construction at its nuclear facility in Oak Ridge, Tennessee.¹²⁶ MK-F negotiated a project-labor agreement with the Building Trades Council, which consisted of sixteen different trade unions.¹²⁷ The project-labor agreement provided that any subcontractor working at the facility must receive its employees through the unions signatory to the project-labor agreement.¹²⁸

The plaintiffs argued that a project-labor agreement requiring that subcontractors agree to union referral procedures violated the Competition in Contracting Act of 1984.¹²⁹ The *Phoenix Engineering* court concluded that no issue of competitive bidding existed because the relevant contracts were with MK-F and not the DOE.¹³⁰ The court accepted the plaintiffs' allegation that competition had been reduced by the project-labor agreement.¹³¹ However, the court held that the plaintiffs had not stated a cause of action upon which relief could be granted because the solicitations in question were not those of a federal agency.¹³²

125. 966 F.2d 1513 (6th Cir. 1992).

126. *Phoenix Eng'g, Inc. v. MK Ferguson of Oak Ridge Co.*, 966 F.2d at 1514.

127. *Id.*

128. *Id.* at 1515. The relevant part of the agreement stated that when contractors needed craft employees, "the Employer shall notify the Unions as to the number and classification of employees required. It shall be the responsibility of the Unions to supply the necessary numbers in accordance with hiring hall procedure." *Id.* In addition, the employer had to use the hiring hall for all employees. *Id.*

129. *Id.* at 1524. See *supra* note 23 for the relevant text of the Competition in Contracting Act of 1984.

130. The contract between MK-F and the DOE provided "[s]ubcontracts shall be in the name of the contractor, and shall not bind or purport to bind the [g]overnment." *Phoenix Eng'g*, 966 F.2d at 1525.

131. *Id.*

132. The plaintiffs then argued an agency theory, alleging that the DOE and not MK-F was the real contracting party. *Id.* at 1526. Citing the language in the contract between the DOE and MK-F, the court rejected the plaintiffs' agency argument. *Id.*

2. *Northern Ohio Chapter of Associated Builders & Contractors, Inc. v. Gateway Electric Development Corp.*

In *Gateway*, an unreported Ohio opinion, the plaintiffs alleged that a project-labor agreement violated the NLRA, the Employee Retirement Income Security Act, equal protection and due process rights, and Ohio's public bidding statute.¹³³ All of the claims, both federal and state, were dismissed.¹³⁴

The claim regarding the violation of the public bidding statute was dismissed without a consideration of its merits. Nonetheless, in dictum, the court addressed the issue of whether the project-labor agreement violated competitive bidding laws.¹³⁵ The *Gateway* court stated that "[t]he practical effect of making compulsory the adoption of the Labor Agreement by successful bidders is to deprive non-union contractors of the opportunity to fairly compete for such contracts"¹³⁶ and that the "obvious effect of the Labor Agreement is to prevent any non-union contractors or laborers from working on the sports complex."¹³⁷ Because the court concluded that the project-labor agreement prevented nonunion contractors from working on the project, the author believes that the *Gateway* court would have found a violation of the competitive bidding laws had the supplemental state law claims not been dismissed.

3. *Minnesota Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis*¹³⁸

This 1993 case directly addressed whether project-labor agreements violate competitive bidding statutes.¹³⁹ The jail in St. Louis County, Minnesota, received repeated citations from the Minnesota Department of Corrections for building, safety,

133. *Northern Ohio Chapter of Associated Builders & Contractors, Inc. v. Gateway Elec. Dev. Corp.*, No. 1:92 CV 0649, 1992 WL 119375, at *1.

134. *Id.* at *14 ("[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966))).

135. *Id.* at *6.

136. *Id.*

137. *Id.* at *4.

138. 825 F. Supp. 238 (D. Minn. 1993).

139. *Minnesota Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis*, 825 F. Supp. at 244.

and fire code violations.¹⁴⁰ These citations led the County to conclude that it needed a new jail facility.¹⁴¹ The bid solicitation for the jail contained a project-labor agreement specification, which stated that each bidder agreed to execute the project-labor agreement.¹⁴² The agreement expressly stated that by executing the project-labor agreement the contractor agreed to recognize Duluth Building and Construction Trades Council as the sole and exclusive bargaining representative of all craft employees on the project.¹⁴³ The specification further stated that bidders agreed "to install the basic hourly wage rates, fringe benefits, hours and working conditions as have been duly negotiated with the Unions listed in Schedule hereto attached and are contained in the Local Duluth Area Collective Bargaining Agreements"¹⁴⁴

The *County of St. Louis* court stated that the County had discretion in determining the lowest responsible bidder.¹⁴⁵ The court, however, failed to recognize two important factors. First, a public agency may not determine that a contractor is not responsible solely because it is either a union or a nonunion contractor.¹⁴⁶ Secondly, the County was not exercising its discretion to determine the lowest responsible bidder; it was qualifying the bidders on union affiliation.¹⁴⁷

The *County of St. Louis* court next asserted that the County had an interest in avoiding labor problems.¹⁴⁸ Labor unrest, however, is not a sufficient reason to authorize the use of a project-labor agreement.¹⁴⁹

The court went on to state that, in any event, Davis-Bacon¹⁵⁰ wages had to be paid on the job; therefore, the project

140. *Id.* at 240.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 241 (omission in original).

145. *Id.* at 242, 245.

146. *See supra* part II.B-C.

147. *See County of St. Louis*, 825 F. Supp. at 240.

148. *Id.* at 244.

149. 57 Fed. Reg. 55,470 (Nov. 25, 1992) (was to be codified at 48 C.F.R. § 22.5, but removed by Exec. Order No. 12,836, 3 C.F.R. 588 (1994)); *see also infra* note 186 and accompanying text; *supra* text accompanying note 124.

150. Davis-Bacon refers to the Davis-Bacon Act passed in 1931. *See* Davis-Bacon Act, ch. 411, § 1, 46 Stat. 1494 (1931). This Act requires that prevailing wages be paid to workers on federally funded construction projects. NASH & SCHOONER, *supra* note 35,

“might not” cost more because of the project-labor agreement.¹⁵¹ Should the courts, however, ignore government contract qualifiers that restrict competition simply because the qualifier “might not” increase the cost of the project?

Finally, the *County of St. Louis* court failed to understand the dynamics involved in union affiliations. The base rate earned by a construction worker is only one factor to be considered. Unions have very specific work rules that restrict a worker’s activity and can increase the production costs of a nonunion contractor. On the other hand, a nonunion worker can perform a variety of tasks. For example, a nonunion employee could operate a piece of earthmoving equipment, place reinforcing bar, and finish concrete, all in the course of a single day. On a union project, the activities of the nonunion employee would be performed by three craftspersons: an operating engineer, an ironworker, and a cement mason. Additionally, nonunion contractors can use unskilled workers to perform simple tasks rather than pay a highly skilled craftsperson for the same task.

Therefore, the potential exists for a nonunion contractor to save the public considerable cost through increased productivity, even when required to pay prevailing wages. Similar wages do not always equate to similar costs.

C. Minnesota Attorney General’s Analysis of Boston Harbor

Public contracting authorities are not the only group inclined to misinterpret the holding of *Boston Harbor*. In a recent opinion, the Minnesota Attorney General (AG) misunderstood *Boston Harbor* to stand for the proposition that it would be a violation of the NLRA to prevent municipalities from using project-labor agreements.¹⁵²

The City of International Falls, Minnesota, planned to construct a new municipal building.¹⁵³ The city council asked the AG if the council could insert a specification into the bid documents that would require the successful bidder to enter into

at 119. Prevailing wage rates are the wages paid to most construction workers in the same work classification on similar construction projects as determined by the United States Department of Labor. *Id.*

151. *County of St. Louis*, 825 F. Supp at 244.

152. 26 Minn. Op. Att’y Gen. 707a, 19 (1993).

153. *Id.*

a project-labor agreement with labor unions.¹⁵⁴ The AG responded that the City of International Falls could utilize the project-labor agreement without violating competitive bidding laws.¹⁵⁵

The beginning of the AG's opinion leads the reader to presume that the AG would not endorse such an agreement. Discussing the proposed project-labor agreement specification the AG stated that:

"[T]he specifications must be so drawn as to give all bidders as [sic] equal opportunity without granting an advantage to one or placing others at a disadvantage." . . . Consistent with that view, this office has previously opined that political subdivisions seeking bids for construction contracts *may not specify that successful contractors agree to use only union workers on a project*.¹⁵⁶

After reaffirming its belief that the use of union-only bidding qualifiers is prohibited, the AG continued with a discussion of *Boston Harbor* and the NLRA in the construction industry.¹⁵⁷ The AG explained that *Boston Harbor* allowed public authorities to utilize project-labor agreements without running afoul of the NLRA.¹⁵⁸ The AG then made a baffling analysis of a small part of the *Boston Harbor* decision. The AG's faulty analysis formed the crux of its opinion.

In *Boston Harbor*, the Supreme Court hypothesized that if it denied public owners the option of a project-labor agreement available to private owner-developers, a restriction may be placed on public owners that is prohibited under the Machinists Doctrine.¹⁵⁹ After quoting the Court's hypothetical, the AG stated, "That possibility simply re-enforces our opinion that local governments in Minnesota may include project-labor agreement specifications in their offers for bids on construction projects without running afoul of state competitive bidding require-

154. *Id.*

155. *Id.*

156. *Id.* at 19-20 (emphasis added) (quoting *Foley Bros., Inc. v. Marshall*, 123 N.W.2d 387, 391 (1993)).

157. *Id.* at 21.

158. *Id.* at 22.

159. *Boston Harbor*, 113 S. Ct. 1190, 1198 (1993). The Machinists Doctrine "prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces." *Id.* at 1192.

ments.”¹⁶⁰

The AG’s statement is perplexing for two reasons. First, earlier in the opinion, the AG suggested that the project-labor agreement did violate state competitive bidding laws.¹⁶¹ Second, can the AG seriously contend that public authorities may do anything a private owner-developer may do?¹⁶² The Supreme Court’s comment in *Boston Harbor* was taken completely out of context. The Supreme Court was referring solely to the preemption doctrine, not competitive bidding statutes, when it hypothesized about prohibited restrictions on public owners.¹⁶³

Private owner-developers do not have competitive bidding laws restricting their activities. Public authorities, however, are subject to competitive bidding statutes.¹⁶⁴ “[G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints.”¹⁶⁵ In the author’s opinion, competitive bidding of public works projects is one such “special restraint” placed on governmental authorities.

IV. ANALYSIS

A. *Evading Responsibility Determinations*

Project-labor agreement clauses, inserted into bid specifications for public construction contracts, permit public authorities to do indirectly what they may not do directly. Two scenarios are presented below which illustrate the power imparted to public authorities through a project-labor agreement bid specification.

160. 26 Minn. Op. Att’y Gen. 707a, 21 (1993).

161. *Id.*; see *supra* text accompanying note 156.

162. Note that union representatives assert that government contracting agencies should be allowed to act outside the restrictions of statutes and governmental rules and regulations. Krizan & Bradford, *supra* note 110, at 63. Robert A. Georgine, President of the AFL-CIO’s Building and Construction Trades Department, recently stated that “[n]othing should hinder or restrict government managers from acting differently than any other purchasers of construction.” *Id.*

163. See *Boston Harbor*, 113 S. Ct. at 1198.

164. See *supra* notes 23-25 for several examples of competitive bidding statutes.

165. *Boston Harbor*, 113 S. Ct. at 1196 (citing *Wisconsin Dept. of Indus. v. Gould Inc.*, 475 U.S. 282, 290 (1986)).

1. Scenario No. 1

Consider a nonunion construction company that bids on a public construction contract. Further consider that the contractor is the low bidder. The specifications for the construction project do not require the contractor to execute a project-labor agreement. To disqualify the contractor as "irresponsible," the public authority must give the contractor an opportunity to be heard on this issue of responsibility.¹⁶⁶ A bidder on public contracts may not be declared irresponsible merely because of its nonunion status.¹⁶⁷

To do so would be an abuse of discretion because of the irrational basis in the responsibility determination.¹⁶⁸ Absent a showing of irresponsibility, the public authority must award the contract to the lowest bidder.

To circumvent this result, many public contracting agencies have adopted project-labor agreement bid specifications.¹⁶⁹

2. Scenario No. 2

Consider again the same capable, experienced, nonunion contractor. The same project is presented by a public agency for competitive bidding. However, this time the public authority qualified the bid package. The successful low bidder must agree to execute a project-labor agreement to be awarded the contract. The project-labor agreement states the lowest responsible bidder agrees to hire all union employees and abide by union rules and regulations.

At this point, the nonunion contractor is faced with three alternative actions, none of which are favorable. Under alterna-

166. See *supra* note 43.

167. *Miller v. City of Des Moines*, 122 N.W. 226, 231 (Iowa 1909).

168. See *supra* note 38 and accompanying text.

169. A leading construction trade magazine editorial made the following comments:

Unions have found a good sharp tool and they know how to use it effectively. From sea to shining sea, public contracting agencies are requiring that all contractors on their projects become signatory to union-only project labor agreements. The agencies range from big regional authorities with billion-dollar projects to local school boards with tiny renovations. The practice flies in the face of state competitive bidding laws and it is out of control. Union tradesman [sic] are fanning out across America and knocking on virtually every town hall door seeking to negotiate project agreements. . . . [T]he pacts limit competition and turn back the clock to when public works projects were doled out to political cronies.

Union-Only Project Agreements Restrict Open Competition, *supra* note 1, at 66.

tive number one, the nonunion contractor can bid on the project and then agree to the project-labor agreement;¹⁷⁰ the nonunion contractor effectively transforming itself into a union contractor. With alternative number two, the contractor can bid on the project and then refuse to execute the project-labor agreement and sacrifice its bid bond.¹⁷¹ Under alternative number three, the contractor does not bid on the project.¹⁷² As the foregoing illustrates, the real effect of a project-labor agreement is to "deprive non-union contractors the opportunity to compete fairly for such contracts."¹⁷³

3. Discussion

The two scenarios presented above demonstrate the power that project-labor agreements confer upon a public authority in awarding contracts. When no project-labor agreement exists in the bid specifications, a nonunion contractor cannot be deprived of the award solely on the basis of his lack of union affiliation. When a project-labor agreement is included in the bid specifications, however, a responsible nonunion contractor may be deprived of the contract award solely on the basis of its lack of union affiliations. The nonunion contractor is forced either to become a union contractor or to forego the opportunity to bid on the project.

Nonunion contractors cannot qualify a bid by rejecting a bid specification requiring a project-labor agreement.¹⁷⁴ Qualifying a bid renders a contractor's bid non-responsive.¹⁷⁵ Non-responsive bids are those that fail to conform to any material¹⁷⁶ specifications of the project.¹⁷⁷ Since project-labor agreement specifications are material,¹⁷⁸ a bid rejecting a project-labor

170. Northern Ohio Chapter of Associated Builders & Contractors, Inc. v. Gateway Elec. Dev. Corp., No. 1:92 CV 0649, 1992 WL 119375, at *6 (N.D. Ohio 1992).

171. *Id.*

172. *Id.*

173. *Id.*

174. See *Prestex, Inc. v. United States*, 320 F.2d 367, 372 (Ct. Cl. 1963) (finding a proposal void when a bidder excluded a specification from its bid).

175. *Id.*

176. Generally, an item is material if it may affect the price, quantity, quality, or delivery of whatever is being procured. See DONALD P. ARKAVAS & WILLIAM J. RUBERRY, *GOVERNMENT CONTRACT GUIDEBOOK* 3-26 (2d ed. 1994).

177. *Id.*

178. This author suggests that a project-labor agreement is a material specification. "The test of whether a variance is material is whether it gives a bidder a substantial

agreement will be considered non-responsive.

B. Political Influence

In addition to the judicial treatment of project-labor agreements, there has been a high level of political involvement in the controversy over the use of such agreements. This involvement has reached the highest level of our government. On October 23, 1992, President Bush signed Executive Order Number 12,818: *Open Bidding on Federal and Federally Funded Construction Projects*.¹⁷⁹ This Executive Order prohibited union-only agreements on federal construction projects.¹⁸⁰ The purpose of the Executive Order was to eliminate the use of project-labor agreements that deny opportunities to nonunion contractors and that discriminate against nonunion workers.¹⁸¹ The Executive Order was also "expected to reduce significantly [the] costs on Federal construction projects."¹⁸²

Pursuant to Executive Order Number 12,818, a new section

advantage or benefit not enjoyed by other bidders." *Coller v. City of Saint Paul*, 223 Minn. 376, 385, 26 N.W.2d 835, 840 (1947). If a nonunion contractor could qualify its bid by rejecting a project-labor agreement specification, that contractor would have a substantial advantage over other bidders who are restricted by and subject to the terms and conditions of the project-labor agreement.

179. Exec. Order No. 12,818, 3 C.F.R. 318 (1993).

180. *Id.* This Executive Order provides in part:

Section 1.(a) To the extent permitted by law, before any executive agency may award any construction contract after the effective date of this order, or obligate funds pursuant to such contract, it shall ensure that neither the agency's bid specifications, project agreements, nor other controlling documents, nor those of any contractor or construction manager, shall:

(1) Require bidders, offerors, contractors or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s), or

(2) Otherwise discriminate against bidders, offerors, contractors or subcontractors for refusing to become or remain signatories or otherwise adhere to agreements with one or more labor organizations, on the same or other related construction project(s), or

(3) Require any bidder, offeror, contractor or subcontractor to enter into, adhere to, or enforce any agreement that requires its employees, as a condition of employment, to:

- (i) become members of or affiliated with a labor organization; or
- (ii) pay dues or fees to a labor organization, over an employee's objection, in excess of the employee's share of labor organization cost related to collective bargaining, contract administration, or grievance adjustment.

Id. at 319.

181. [1991-1993 Transfer Binder] Gov't Cont. Rep. (CCH) ¶ 99,590.

182. *Id.*

was added to the Code of Federal Regulations (CFR).¹⁸³ The new rule explained that some situations may require the use of a project-labor agreement.¹⁸⁴ These situations include national security and imminent threats to public health or safety.¹⁸⁵ The rule specifically stated that the threat of labor unrest was not a reason that could be used to justify the use of a project-labor agreement.¹⁸⁶ The reason usually given by public authorities in support of project-labor agreements is the possibility of labor unrest on the project.¹⁸⁷ The CFR indicates that project-labor agreements should only be permitted when the damage

183. 57 Fed. Reg. 55,470 (Nov. 25, 1992) (was to be codified at 48 C.F.R. § 22.5, but removed by Exec. Order No. 12,836, 3 C.F.R. 588 (1994)).

184. *Id.* at 55,471.

185. *Id.*

186. *Id.* This regulation provided in part:

(a) The head of an Executive agency may exempt a particular project, contract, or subcontract from the requirements of any or all of the provisions of this subpart, if the agency head finds that special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security.

(b) A finding of "special circumstances" under (a) may not be based on the possibility of, or an actual labor dispute concerning the use of . . .

. . . .

(2) Employees on the project who are not members of or affiliated with a labor organization.

Id. (emphasis added).

187. See *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 368 (8th Cir. 1991) (supporting labor agreements, the director of public works suggested that a project-labor agreement be negotiated to prevent the threat of labor strikes or lockouts); *Minnesota Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis*, 825 F. Supp. 238, 244 (D. Minn. 1993) (arguing in support of labor agreements, the County asserted that the project-labor agreement was needed to insure against work stoppages and lockouts to guarantee that the project will be completed in an orderly manner); *Lott Constructors, Inc. v. Camden County Bd. of Chosen Freeholders*, No. 93-5636, 1994 WL 263851 at *4, 128 Lab. Cas. ¶ 57,681 (D.N.J. Jan. 31, 1994) (citing evidence in a resolution pertaining to the required project-labor agreement, the Board stated that it sought to avoid labor disputes which might disrupt the project in the form of strikes, lockouts, or slow-downs); *General Bldg. Contractors, Inc. v. Dormitory Auth.*, 620 N.Y.S.2d 859, 860 (N.Y. App. Div. 1994) (noting that "[i]n particular, the Dormitory Authority considered . . . the potential for labor unrest"); *New York State Chapter, Inc. v. New York Thruway Auth.*, 620 N.Y.S.2d 855, 856 (N.Y. App. Div. 1994) (arguing in support of a labor agreement, the Thruway Authority asserted that the project-labor agreement was necessary because a prior bridge project performed by a nonunion contractor resulted in a labor dispute with the union causing delays); *George Harms Constr. Co. v. New Jersey Turnpike Auth.*, 644 A.2d 76, 79 (N.J. 1994) (responding to recent labor unrest, the Turnpike Authority adopted a resolution which provided that "in consideration of . . . the recent labor disruption affecting the Widening Project, it is in the best interest of the Authority to implement the use of project labor agreements . . .").

caused by them is less than some other potential damage to the public.¹⁸⁸

The shift of political power in the 1992 elections signaled the end of President Bush's actions to protect the rights of nonunion contractors. President Clinton was elected on November 3, 1992, and took office on January 20, 1993. President Clinton revoked President Bush's Executive Order Number 12,818 on February 1, 1993, merely eleven days after taking office.¹⁸⁹

President Clinton had the full support of the AFL-CIO in his election bid.¹⁹⁰ As a result, President Clinton's Executive Order, which validated and encouraged project-labor agreements, was predictable and expected.¹⁹¹ Just two days after the November 3, 1992, presidential election, the AFL-CIO Executive Council held a special meeting to plan its "working relationship" with the new administration.¹⁹² An AFL-CIO spokesperson made it clear that the AFL-CIO wanted newly elected President Clinton to take "quick action" to overturn President Bush's Executive Order prohibiting project-labor agreements.¹⁹³ The AFL-CIO sought and received President Clinton's swift action to reverse "some of the damage" done to organized labor by President Bush's Executive Order prohibiting project-labor agreements.¹⁹⁴

188. See *supra* note 187.

189. Exec. Order No. 12,836, 3 C.F.R. 588 (1994). President Clinton stated the revocation of Executive Order Number 12,818 of October 23, 1992, was necessary to reduce federal government intrusion into workplace relations. Statement on Revocation of Certain Executive Orders Concerning Federal Contracting, 1993 PUB. PAPERS 27 (Feb. 1, 1993).

190. *Kirkland Assails Bush, Congress, Praises Clinton at AFL-CIO Meeting*, 151 DAILY LAB. REP. A-7, Aug. 5, 1992, available in WESTLAW, BNA-DLR database (reporting the comments of Lane Kirkland, President of the AFL-CIO); *AFL-CIO Official Tells California Meeting That Clinton Is 'Best Spokesman' for Workers*, 146 DAILY LAB. REP. A-4, Jul. 29, 1992, available in WESTLAW, BNA-DLR database; *Organized Labor Embracing Clinton Candidacy, Officials Suggest*, 138 DAILY LAB. REP. A-16, Jul. 17, 1992, available in WESTLAW, BNA-DLR database; *Unions Unite Behind Clinton as the Best Choice for Labor*, 134 DAILY LAB. REP. C-1, Jul. 13, 1992, available in WESTLAW, BNA-DLR database; *AFL-CIO Leaders Back Clinton for Democratic Nomination*, 88 DAILY LAB. REP. A-9, May 6, 1992, available in WESTLAW, BNA-DLR database.

191. 215 DAILY LAB. REP. A-9, *Labor Hails Clinton Victory, Return of Democrats to Congress*, Nov. 5, 1992, available in WESTLAW, BNA-DLR database.

192. *Id.*

193. *Id.*

194. *Id.*

On March 10, 1993, Senator Don Nickles (R-Okla.) introduced a bill in response to President Clinton's revocation of Presidential Order Number 12,818.¹⁹⁵ This bill, assigned to the Senate Committee on Governmental Affairs as the Federal Construction Equity Act of 1993,¹⁹⁶ was intended to "prohibit discrimination in contracting with potential contractors and subcontractors in federally funded construction projects on the basis of certain labor relations policies of the potential contractors and subcontractors."¹⁹⁷ The Federal Construction Equity Act of 1993 died in the Governmental Affairs Committee, which was controlled by a Democratic majority.¹⁹⁸

Due to the recent transformation of the political landscape in 1992-1993, project-labor agreements are still in use on federally funded construction projects today.

C. Public Policy

It is not in the public's best interest to withhold a contract merely because a contractor does not employ union workers. In addition to being nonunion, such contractors may also be responsible low bidders. If project-labor agreements persist, competition will suffer. The use of nonunion labor helps keep the cost of union wages in check. Should public authorities continue on the path towards specifying project-labor agreements, unions could eventually monopolize public works contracts.¹⁹⁹ This potential monopoly will significantly increase the cost of public construction projects by eliminating nonunion competition.

As unions become firmly entrenched as the sole source of labor for public works projects, will the public notice? Will corrective action occur? Will unions complain if public authorities start qualifying bidders by specifying that the successful low bidder cannot use union labor if awarded the project? Certainly, unions would protest vigorously. In 1932, the court in *State ex rel. United District Heating v. State Office Building Commission* suggested that if an award of a public contract could be denied

195. [1993-1994] 1 Cong. Index (CCH) 14,180.

196. *Id.*

197. *Id.*

198. *Id.* at 12,061.

199. See *Miller v. City of Des Moines*, 122 N.W. 226, 230 (Iowa 1909) (observing that discrimination between union and nonunion "tends to monopoly").

upon the sole ground that the lowest bidder did not employ union labor exclusively, it could for the same reason be denied upon the sole ground that he did employ only union labor.²⁰⁰ In a subsequent statement, which is particularly relevant to the project-labor agreements of today, the court said, "The claim is made that costly delays and added expenses may occur because of possible trouble, if the contract be not awarded to the bidder employing union labor. *This claim assumes that a great state cannot control its law requiring public bidding.*"²⁰¹ If public authorities can use project-labor agreements today to discriminate against nonunion contractors, then the same authorities could use other bid qualifiers tomorrow to discriminate against union contractors.

A final argument for eliminating project-labor agreements concerns the capitalist culture in the United States. Market forces should determine the use of project-labor agreements. This Comment acknowledges that project-labor agreements may be desirable for certain contractors. A union contractor can more accurately predict its hourly labor cost for each man-hour²⁰² of work expended on the project when it has such a contract.²⁰³ But, even a contractor signatory to a project-labor agreement is subject to larger and more unpredictable production variables, such as how many square feet of concrete forms can be erected per manhour, how many yards of dirt can be transported per manhour, how many pounds of steel can be placed per manhour.

Assume that the use of project-labor agreements does save labor costs on a construction project. If a contractor's competitors successfully underbid solely by utilizing project-labor agreements, the unsuccessful contractor will not ignore project-labor agreements. The forces of competition will guide the contractor toward the use of project-labor agreements.

Advocates for the use of project-labor agreements assert that favors are not dispensed to unions or union contractors as a

200. State *ex rel.* United Dist. Heating v. State Office Bldg. Comm'n, 181 N.E. 129, 129 (Ohio 1932).

201. *Id.* (emphasis added).

202. A manhour is a unit of measure that refers to one man working for one hour. See WEBSTER'S UNABRIDGED DICTIONARY 1095 (2d ed. 1983). Thus, 20 men working for eight hours equals 160 manhours.

203. See *supra* note 19 and accompanying text.

result of such agreements.²⁰⁴ If this assertion is true, then why does a prohibition against project-labor agreements “damage” the interests of organized labor?²⁰⁵ Why are union representatives pounding on the door of every town hall across the country in an effort to influence public authorities to enter into project-labor agreements?²⁰⁶

V. CONCLUSION

The effect of a project-labor agreement specification is to lessen competition in favor of union-only contractors. For this reason alone, project-labor agreements must be eliminated from the specifications of public work contracts. Moreover, federal, state, and municipal competitive bidding laws preclude action by public authorities that tends to decrease competition among all potential bidders.

The continued use of project-labor agreements may encourage the use and abuse of further qualifiers to government contracts. Such qualifiers enable, and may actually promote, political cronyism at all levels of our government. Bid qualifiers that inhibit or reduce competition among all potential bidders violate the intent of competitive bidding laws. Qualifiers like project-labor agreements may lead to more qualifiers to bidding systems that, in turn, may breed corruption into the bidding process. While union contractors now have a distinct advantage where project-labor agreements are permitted, they too should be concerned about the use of project-labor agreements. Someday the use of prejudicial qualifiers may be used against them when it becomes routine for public authorities to qualify bids.

Project-labor agreement specifications deny nonunion contractors the opportunity to demonstrate that they are “responsible” bidders. Public authorities may consider a contractor’s labor affiliations to determine if the contractor is responsible within the meaning of competitive bid statutes. But

204. One of the main purposes of competitive bidding is to prevent favoritism. See *supra* note 31 and accompanying text. Thus, each time a project-labor agreement is defended against a competitive bidding violation charge, the defenders of the agreement indicate their belief that unions and union contractors are not favored by the project-labor agreement.

205. See *supra* note 194 and accompanying text.

206. See *supra* note 169.

when a low bidder is denied "responsible bidder" standing, the bidder is entitled to a hearing on the reasons for the determination. When a bid package specifies that the contract award will only be given to the low bidder who executes a project-labor agreement, nonunion contractors are effectively precluded from bidding on the public works projects requiring project-labor agreements as they are not given a chance to demonstrate their responsibility.

Courts uniformly hold that public authorities may not discriminate against bidders on the basis of union affiliation alone. The effect of project-labor agreements is to achieve that exact purpose, discrimination against nonunion contractors. If public agencies want to persist in employing union-only labor on their construction projects, the public agencies should be made to do so in the open. Projects should be let without the union-only qualifier, with the contract award going to the lowest responsible bidder, as intended by competitive bidding statutes. If the contracting authority finds that the nonunion contractor is not responsible, at least it has been given the fair opportunity to bid on the project and present its qualifications. This is still the best way to protect all parties interested in the government contracting process without the appearance of impropriety.

A fundamental policy of government procurement is to ensure that specifications are drafted to promote maximum competition.²⁰⁷ Project-labor agreement specifications contravene rather than further the policy of maximum competition.

207. Michael K. Love, *Enforcing Competition Through Government Contract Claims*, 20 U. RICH. L. REV. 525, 583 (1986).